UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

SWINERTON BUILDERS, INC.,

Employer,

and Case 27-RC-8261

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 9, AFL-CIO,

Petitioner.

DECISION AND ORDER

On June 23, 2003, International Union of Operating Engineers, Local 9, AFL-CIO filed a petition under Section 9(c) of the National Labor Relations Act (the Act) seeking an election among a bargaining unit described as "All crane operators, tower crane operators, hoist operators, equipment operators, oilers, and mechanic welders."

A hearing in this matter was held on July 15, 2003, and at the hearing the Petitioner amended the petition to include in the unit only tower crane operators and hoist operators.[1] The positions of the parties are as follows: The Petitioner argued that the unit is appropriate because employees in those job classifications, employed at the Employer's current construction project in Denver, Colorado, have a reasonable expectation of continued employment. The Employer argued that the unit is inappropriate and that the petition should be dismissed on the basis that the employees

[1] In its post-hearing brief, the Petitioner requested that the Regional Director ". . . determine that 'hoist operator', in the general sense, includes internal elevator operator." Because the Employer does not currently employ elevator operators and for the reasons discussed below, the Petitioner's request is denied.

in the described unit are temporary employees with no reasonable expectation of continued employment. For the reasons set forth below, I find that the unit sought by the Petition is not appropriate and the petition must be dismissed.

Under Section 3(b) of the Act, I have been delegated by the Board its powers in connection with this case.

Upon the entire record in this case, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. Based upon the record, no question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act for the reasons set forth below.

FACTS

The Employer, Swinerton Builders, Inc.,[2] is a California corporation engaged in the construction industry in the State of Colorado. The employees in the petitioned-for unit are currently employed at the Employer's Beauvallon project in Denver, CO where

[2] The Employer is a California corporation engaged in the construction industry in the State of Colorado. During the past calendar year the Employer purchased and received at its Colorado operations goods or materials valued in excess of $50,000 directly from suppliers located outside of the State of Colorado.

the Employer is the general contractor in the building of a twin tower condominium.[3] The project started in approximately late June 2002. The building consists of a north tower, a south tower, and a connecting central building. The Beauvallon project required a crane and an operator for each tower and a hoist and operator for each tower. The north tower crane was taken down in late June 2003, and the employment of that employee was terminated at that time. The south tower crane is scheduled to be taken down in August or September, 2003, at which time the south tower crane operator will be terminated. North tower hoist work is scheduled for completion in late September and south tower hoist work is scheduled for completion in November. The hoist operators will be terminated at the time the hoists they are operating are taken down. The entire project is scheduled for completion in February 2004.

The Employer's long-standing general policy is to not employ tower crane or hoist operators, but to subcontract that work with a subcontractor providing both the equipment operators and the equipment. The record evidence reflects that of the 45 to 50 projects performed by the Employer's Denver Division in the eleven years before the Beauvallon project, there has been only one other exception to the Employer's policy not to employ tower crane or hoist operators. In approximately, 1997 the Employer employed a hoist operator on a project.

However, on the project that is the subject of this petition, the Employer agreed with the client's (Beauvallon Corporation) request to use crane equipment procured by the client. As part of the consideration for this deviation from its policy, Beauvallon

Corporation agreed to hold the Employer harmless in the event of default by the equipment provider. Because the Employer was unable to find a subcontractor willing to perform hoist work separate and apart from the crane work, it leased hoist equipment resulting in the need to hire operators for both types of equipment.

The Employer hired north tower crane operator Dan Colley in July 2002, south tower crane operator Larry Webber in August 2002, north tower hoist operator Harold Hawkins in January 2003 and south tower hoist operator Gary Knudson in April 2003. Larry Webber resigned his employment in the spring of 2003 and Mitch Gomez was hired on May 2, 2003, to replace him. As is noted above, the work performed by north tower crane operator Colley was completed and the north tower crane dismantled in June 2003, at which time Mr. Colley's employment was terminated.

The Employer's operations manager, Jeffery Hanson, testified without contradiction that when the work for each piece of equipment is completed, the equipment will be taken down and the employment for that equipment will immediately end. The record evidence further indicates that after this work is completed, there is no possibility that the Employer will perform further work at the Beauvallon project using tower cranes or hoists using its own employees to operate such equipment or similar but smaller equipment.

FINDINGS

In deciding whether employees are temporary and thus not included in an appropriate unit, the Board has applied essentially a two-pronged test. The Board finds temporary employees eligible to vote if their tenure of employment remains uncertain on

[3] The Employer's Denver Division, at any particular time, typically is involved in five or six construction projects.

the eligibility date or if the employees in question have a reasonable expectation of continued employment. **New World Communications**, 328 NLRB 3 (1999). As to the "date certain" test, it ". . . does not require a party contesting an employee's eligibility to prove that the employee's tenure was certain to expire on an exact calendar date. It is only necessary to prove that the prospect of termination was sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired." **Caribbean Communications Corp.,** 309 NLRB 712-13 (1992). In addition, the Board has found that when the employment will terminate within three to four months, no useful purpose is served by directing an election. **Davey McKee Corporation**, 308 NLRB 839 (1992).

In support of its position that the employees in this matter have a reasonable expectation of continued employment, the Petitioner argues that in spite of the Employer's policy to not hire crane and hoist operators, it has made an exception to its policy on this project and on one other occasion. The Petitioner also claims that Operations Manager Hanson admitted that, although the company would resist it, the Employer could possibly employ hoist and crane operators in the future. I find no such admission in the record. Moreover, given the Employer's history in this regard, the mere possibility of future employment is speculative and an insufficient basis for finding that the crane and hoist operators in the petitioned-for unit have a reasonable expectation of future employment with this Employer.

The Petitioner further argued that the petitioned-for employees have a reasonable expectation of continued employment because there was testimony at the hearing to "indicate" that because of contingencies on the project, it is difficult to

"pinpoint exactly when the hoists on the Beauvallon project will no longer be used". The Petitioner additionally argues that there is testimony to show that the Employer's project completion schedule, "is probably overly optimistic." I find, however, that the record does not support a finding that it is difficult to determine when the petitioned-for employees will no longer be employed by the Employer. There is no record evidence to show that any contingencies are in existence or otherwise anticipated. Nor is there evidence to show that the Employer's project completion schedule is not reasonably based. Rather, the record discloses only that the Beauvallon project is on schedule or slightly ahead of schedule. In any event, as discussed, in **Caribbean, supra,** the Board does not require proof that an employees' tenure will expire on an exact date. Accordingly, I find the Petitioner's argument in this regard to be unpersuasive.

The Petitioner also argued that crane and hoist operators have expectation of future employment with the company because the Employer, ". . .maintains contact information for hoist operators and crane operators who have worked for the company," and because the Employer makes no distinction between employees categorized as regular employees and temporary employees for purposes of providing health care and retirement benefits. However, there is no record evidence to establish that the Employer maintains contact information for formerly employed hoist operators and crane operators except to the extent that the Employer maintains the personnel files established for these employees. The record is silent with respect to the period of time that these files are maintained. As to the issue of eligibility for benefits, the record establishes only that there is no distinction made by the Employer between employees hired to operate crane and hoist equipment on the Beauvallon project and other

employees hired for the Beauvallon project or for other projects of the Employer, i.e. all employees receive the same information and are eligible for Employer benefits upon qualification. I find that these factors do not evidence any realistic expectation that the Employer will employ the crane and hoist operators when their work on the Beauvallon project is completed within the next few months.

Finally, the record evidence reflects that all work performed by the three petitioned-for crane and hoist operators will be completed by November 20, 2003. As noted above, the south tower crane is scheduled to come down no later than September 2003 and the north tower hoist is scheduled to come down on September 25, 2003. The operators currently operating that equipment will be terminated at the time the equipment is taken down. Thus, the unrefuted evidence is that, as of the late September date, the Employer will employ only a single employee in the petitioned-for unit[4] and that even that employee will be terminated by November 20, 2003, when the hoist he is operating is scheduled to come down. The entire Beauvallon project is scheduled for completion in February 2004.

After the crane and hoist work is completed in November 2003, the Employer will utilize internal elevators on the project until completion of the project. The Petitioner on brief argues that, because operation of internal elevators is work traditionally performed by craft employees represented by the Petitioner, this is a compelling reason to direct an election in this matter. However, the record evidence does not support a conclusion that any of the petitioned-for employees will be employed to operate the internal

[4] Even in the context of a 9(a) relationship, an employer is privileged to withdraw recognition if the evidence establishes that the unit consists of only one statutory employee. **Kirkpatrick Electric Co.**, 314 NLRB 1047 (1994).

elevators after the cranes and hoists have been taken down. In that regard, the Employer's senior superintendent on the Beauvallon project, John Duven, testified without contradiction that no current crane or hoist operator would be offered employment as operator of an internal elevator. Mr. Duven further testified that the internal elevators will either be automated or they will be operated by a common laborer compensated at a much lower rate of pay than that of a crane or hoist operator.

In accordance with the foregoing discussion, it does not appear that the Employer will employ the petitioned-for employees for a sufficient period of time to warrant directing an election in this matter. Similarly, the record evidence does not establish any reasonable likelihood that the Employer will employ the petitioned-for employees at any time in the future.

ORDER

Inasmuch as I have found that crane operators and hoist operators employed by the Employer on its Beauvallon project in Denver, Colorado are temporary employees with no expectation of continued employment beyond the next few months, it would serve no useful purpose to direct an election in this matter. I shall, therefore, dismiss the petition.[5]

[5] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a Request for Review of this Decision and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 Fourteenth Street. NW, Washington, DC 20570. In order to be timely filed, a request for review must be received by the Board in Washington by August 8, 2003.

Dated at Denver, Colorado this 25th day of July 2003.

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Michael W. Josserand
Acting Regional Director, Region 27
National Labor Relations Board
Dominion Plaza,
600 Seventeenth Street, North Tower
Denver, CO 80202-5433

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